No. 97-428

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AIR LINE PILOTS ASSOCIATION,
Petitioner,

v.

ROBERT A. MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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PETITIONER'S REPLY BRIEF

I. ARBITRATION BEFORE AN IMPARTIAL DECISIONMAKER IS A FAIR AND EFFICIENT METHOD OF RESOLVING AGENCY-FEE DISPUTES.

Throughout respondents' brief, aspersions are cast on the fairness and effectiveness of arbitration as a means of resolving agency-fee disputes. We address this subject first, because we realize the Court would be reluctant to require exhaustion of procedures it regarded as inherently unfair or ineffective. As we shall demonstrate, however, arbitration is not only a fair means of resolving agency-fee disputes, it is probably the only procedure that offers the kind of flexibility that such disputes require.

Respondents contend that the time allowed for requesting arbitration under ALPA's rules is inadequate (*see* Resp. Br. 40), and they criticize the American Arbitration Association (AAA) Rules for not giving challengers a role in the selection of the arbitrator or a right to "peremptorily disqualify" the arbitrator selected by the AAA (*id.* at 5, 31-32), for not incorporating judicial rules of evidence, and for not providing for prehearing discovery and identification of witnesses (*id.* at 5, 37). There is no merit to any of these criticisms.

In compliance with *Hudson*'s requirement of a "prompt" dispute resolution procedure, 475 U.S. 292, 310 (1986), ALPA gives pilots 30 days from receipt of ALPA's "Statement of Germane and Nongermane Expenses" (SGNE) to request arbitration. Along with the SGNE, the pilots receive a copy of ALPA's written "Policies and Procedures Applicable to Agency Fees," which informs them of the 30-day requirement. (J.A. 69). If the pilot is dissatisfied with the SGNE, there is no reason why he would need more than 30 days to submit his arbitration request. A similar 30-day requirement existed in the procedure that the Court reviewed in *Hudson* itself, 475 U.S. at 296, and the Court found no fault with that requirement. *See also Andrews v. Educational Ass'n of Cheshire*, 653 F. Supp. 1373, 1378 (D. Conn.), *aff'd*, 829 F.2d 335 (2d Cir. 1987) ("The interest in a prompt resolution of such disputes is clear. The thirty-day period for objections is surely reasonable, and, indeed, ample.").

Under the AAA rules, the arbitrator is selected by the AAA itself "from a special panel of arbitrators experienced in employment relations." (Rule 3, J.A. 88). The rules ensure impartiality by requiring the arbitrator to "disclose any circumstance likely to create a presumption of bias" and permit parties to "challenge an arbitrator for cause." (Rule 4, J.A. 89). The AAA selection procedure has been reviewed for fairness and approved by five

circuits.[1] Respondents offer no basis for questioning the integrity of this selection process or the trustworthiness of the arbitrators chosen by it.

The other procedural features criticized by respondents are common to arbitration generally (including, for example, grievance arbitration under collective bargaining agreements) and have never been deemed to be unfair. Judicial rules of evidence are not rigidly applied in arbitration, but there clearly are constraints on the type of evidence that can be presented. The AAA rules direct the arbitrator to "be the judge of the relevance and materiality of the evidence offered." (Rule 14, J.A. 90). Similarly, while there are no provisions for discovery *per se*, the AAA rules empower the arbitrator to require production of "such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute." (*Id.*)[2]

It is important to bear in mind that the arbitration rules applicable in this case were promulgated by the AAA for the express purpose of providing an "expeditious, fair, and objective" procedure (J.A. 85, quoting *Hudson*, 475 U.S. at 307) for resolving agency-fee disputes by means of an impartial decisionmaker. (J.A. 85).

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[1] *See* cases cited in our opening brief at p. 23 n.11.

[2] Respondents assert that the arbitrator in this case "denied the pilots any discovery" under Rule 14. (Resp. Br. 34). That is not true. Respondents never requested the production of any evidence or information pursuant to that rule. That is not surprising, since respondents, having filed their lawsuit in December 1991, had obtained discovery in that lawsuit for two years before the date of the arbitration hearing. Respondents' brief implies that ALPA resisted all discovery in the district court, but that is also not true. ALPA produced approximately 7,400 pages of documents in response to 6 separate document requests, answered 56 interrogatories, and produced 5 witnesses for deposition, including its Director of Finance. (*See* R. 89, Ex. 1). In addition, ALPA's independent auditors, Price Waterhouse, produced two witnesses for deposition and 400 pages of documents relating to its audits. (*Id.*) Respondents had most of these discovery materials at the time of the arbitration. (*See* R. 69, p. 2).

The AAA is the leading arbitration organization in the United States, and litigants have long relied on its rules, procedures, and arbitrators for arbitration of all manner of disputes, often involving extremely high stakes. The suggestion that the rules the AAA developed for the specific purpose of resolving agency-fee disputes are somehow biased or procedurally unfair is implausible on its face.

Not only is arbitration under the AAA rules procedurally fair to all parties, but it is particularly well-suited for the efficient resolution of agency-fee disputes. To demonstrate this, it is necessary to look more closely at how such disputes are presented in arbitration.

This Court has held that agency-fee objectors need not specify the particular union expenditures or activities that they regard as outside the realm of collective bargaining; rather, they can simply assert their opposition to all "ideological expenditures of any sort that are unrelated to collective bargaining." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 241 (1977). This means that, when an objector challenges a union's fee calculation, the union has no way of knowing which of its thousands of expenditures are being contested. Nevertheless, the union has the burden of proving that its expenditures have been properly categorized as chargeable or nonchargeable.

It is obviously impractical for a union to meet this burden by presenting detailed evidence concerning every individual item of expense. The most a union can do is what ALPA did at the arbitration in this case—provide evidence describing its overall operations, governance, and management; the nature and operation of its accounting system and how it tracks costs by functional "project"; the methods and criteria it uses to allocate its costs based on whether they are germane or not germane to collective bargaining; and the results of those allocations for the year in question.[3]

[3] Respondents characterize the evidence ALPA presented as "self-serving, general explanations of ALPA's activities, bookkeeping system, and preparation of the SGNE" (Resp. Br. 5), and complain that ALPA's accounting exhibits were "summaries or blank forms." (*Id.* at 5-6). In fact, ALPA's witnesses presented factual testimony, under oath, based on personal knowledge. The "blank forms" respondents refer to (R. 99, Arb. Exhs. 8, 9) were actual accounting forms used by ALPA to record and track expenses, and were offered as part of its explanation of how the accounting system works. The "summaries" respondents refer to consisted of actual accounting data compiled from ALPA's computer accounting system. (*Id.*, Arb. Exhs. 12, 13). They are "summaries" only in the sense that all accounting reports are summaries of the underlying financial transactions.

Once the proceeding is underway, however, specific issues will inevitably emerge. The objectors, through cross-examination and/or presentation of their own evidence and arguments, will tend to focus on the chargeability of particular union activities and categories of expenditures. At that point, the flexibility of arbitration becomes particularly useful. It allows the proceedings to be recessed, if necessary, to permit the gathering of additional evidence needed to respond to issues that are raised for the first time in the course of the hearing. If the arbitrator believes additional evidence is required to clarify certain points, he can request that it be produced.

For example, at the arbitration hearing in this case, respondents' cross-examination of ALPA's Director of Finance focused a great deal of attention on certain overhead expenses, suggesting that ALPA had not properly allocated them as germane and nongermane. (R. 99, Arb. Tr. 369-84, 466-70). During one of the recesses in the proceeding, ALPA was able to prepare additional testimony and highly detailed accounting exhibits showing how four major categories of overhead expense were distributed among scores of individual "project" accounts. (*Id.* at 542-62 and ALPA Arb. Exhs. 13A-D). Similarly, on the second day of the hearing the arbitrator himself questioned the germaneness to collective bargaining of ALPA's activities related to air safety (Arb. Tr. 271-72), and ended up telling ALPA "you should plan having

someone here who can give us additional information in terms of [the safety activities'] relevance to negotiations or to the performance of representational functions." (*Id.* at 281). In response, ALPA called an additional witness on the third day of the arbitration hearing to address that specific issue. (*Id.* at 614-733). This was possible only because there was a one-month recess between the second and third day of the hearing, something that would probably not have occurred in a court proceeding.

This kind of flexibility is important because there is no way a union can predict, prior to the commencement of a hearing, all the issues that will be raised and all the evidence that may become relevant. As a theoretical matter, every document relating to every expense incurred in the course of a year could become relevant. Similarly, every union official or employee has knowledge that may be relevant to the issue of whether particular activities or expenses are germane to collective bargaining. Without advance knowledge of the specific issues that will be the focus of the proceeding, a union has little ability to predict just which documents and witnesses it should prepare to introduce. It is obviously impossible to produce every such document or every such witness—and even if it were possible to do so, no court or arbitrator would have the time and energy to hear, examine, or assimilate that volume of evidence.[4]

It is difficult to conceive how a court could fairly try an agency-fee dispute *ab initio*, given that the plaintiffs

[4] The problem is illustrated by certain discovery disputes that arose between the parties in the district court. Respondents served some document requests on ALPA that would effectively have required production of all documents relating to all expenses incurred by ALPA for various years, including 1992. ALPA objected to these requests as unreasonably burdensome. (*See* R. 40, Exh. 1; R. 89, Exh. 1). The documents for the year 1992 alone filled approximately 100 file boxes stored in a warehouse, and it may be presumed that the records for the other years were equally voluminous.

who challenge an agency-fee calculation are not required to state any grounds whatsoever for their challenge. On the other hand, if the challengers are required to exhaust an arbitration process before seeking judicial relief, the case will come to the court with a defined set of issues and an evidentiary record. Regardless of what standard of review would then be applicable, the court would be in a far better position to resolve the dispute expeditiously than it would be if there had been no arbitration.

II. RESPONDENTS' ATTACK ON ARBITRATION AS A MEANS OF RESOLVING AGENCY-FEE DISPUTES CONFLICTS WITH THIS COURT'S DECISION IN *HUDSON*.

Respondents discuss the arbitration procedure in this case as if it were nothing more than an ALPA plot to thwart the rights of agency-fee objectors. In fact, ALPA adopted that procedure not for its own benefit, but to comply with the *Hudson* requirement that there be an "impartial decisionmaker" to hear and decide agency-fee challenges. Respondents' attack on that procedure is, in effect, an attack on *Hudson* itself.

It is clear that *Hudson* contemplates some form of arbitration. Indeed, one of the issues in *Hudson* was whether the arbitration procedure that the union in that case had already established was satisfactory, and the only fault the Court found with that procedure was that it allowed the union itself to select the arbitrator. *See* 475 U.S. at 308. The Court seemed satisfied that if that defect was corrected, the arbitration mechanism would provide the "expeditious, fair, and objective" procedure that was required. 475 U.S. at 307. There was no suggestion that the arbitration must also provide for discovery, or follow judicial rules of evidence. The Court expressly disagreed with the Seventh Circuit's view "that a full-dress administrative hearing, with evidentiary safeguards, is part of the 'constitutional minimum.'" 475 U.S. at 308 n.21.

Thus, respondents' attack on the fairness and adequacy of arbitration as a means of resolving agency-fee disputes is fundamentally at odds with the *Hudson* decision. And, as we have previously argued, respondents' ultimate position on the issue of exhaustion is also inconsistent with the goals of *Hudson*. Little purpose would be served by an "impartial decisionmaker" procedure if, as respondents contend, objectors are free to disregard it and bring their dispute directly to court.

III. THERE IS NO LEGAL BARRIER TO REQUIRING EXHAUSTION OF THE *HUDSON* IMPARTIAL-DECISIONMAKER PROCEDURE.

Respondents contend that exhaustion cannot be required because (a) no agreement between the parties requires exhaustion, (b) no statute requires exhaustion, and (c) an exhaustion requirement would violate Article III of the Constitution.

The first two of these arguments are inconsistent with decisions of this Court holding that exhaustion can be required as a matter of judicial discretion, even when not required by statute or agreement, so long as no statute prohibits such a requirement. *See Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982) ("Of course, courts play an important role in determining the limits of an exhaustion requirement and may impose such a requirement even where Congress has not expressly so provided."). *See also id.* at 518 (White, J., concurring) ("exhaustion is 'a rule of judicial administration,' . . . and unless Congress directs otherwise, rightfully subject to crafting by judges"); *McGee v. United States*, 402 U.S. 479, 483 n.6 (1971) ("Nor is it tenable to say that the [exhaustion] doctrine is inappropriate when fashioned by judicial decision rather than specific congressional command."); *McCarthy v. Madigan*, 503 U.S. 140, 144, 152 (1992) ("where Congress has not clearly required exhaustion, sound judicial discretion governs"). Respondents

cannot point to anything in the text or legislative history of the Railway Labor Act that precludes an exhaustion requirement. The statute is entirely silent on the issue. The Court is thus free to decide it as a matter of judicial discretion.

Nor is there merit to respondents' argument that because a union's obligations to agency-fee objectors are part of its duty of fair representation, *see Communications Workers v. Beck*, 487 U.S. 735, 742-44 (1988), the courts are the proper forum in which to enforce those obligations. When this Court held in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204-07 (1944) that the duty of fair representation under the Railway Labor Act is enforceable by the courts, it was addressing a question of jurisdiction, not exhaustion. The question was whether a court or some other body, such as the Railroad Adjustment Board, had jurisdiction to enforce the duty of fair representation. Here the issue is quite different. *Hudson* held that part of a union's duty of fair representation with respect to agency fees is to provide an impartial-decisionmaker procedure for resolving agency-fee disputes. This ruling raises the issue whether an objector must exhaust that procedure before bringing the underlying fee dispute to court. No such issue can arise in other kinds of fair representation situations, where no similar dispute-resolution procedure exists. Thus, neither *Steele* nor its progeny can shed any light on the issue presented here.

Finally, there is no merit to respondents' argument that an exhaustion requirement would violate Article III, Section 1 of the Constitution, which vests "[t]he judicial Power of the United States" in the federal courts. If this argument had merit, *Hudson* itself could not stand, because that case forces unions (which have the same rights under Article III as respondents) to submit agency-fee disputes to adjudication before a nonjudicial decisionmaker. Article III is not implicated here, however, because the impartial-decisionmaker procedure mandated by *Hudson* is not a limitation on the jurisdiction of the fed-

eral courts, but rather a limitation on the underlying substantive rights of the parties to agency-fee disputes. As to the unions, *Hudson* effectively holds that their substantive right to enter into and enforce agency-shop agreements is subject to an obligation to provide an impartial-decisionmaker procedure to resolve certain classes of fee disputes. Similarly, the objectors' right to have their fees adjusted to exclude costs unrelated to collective bargaining should be subject to the condition that any dispute as to the fee adjustment must initially be submitted to the impartial decisionmaker. Such a condition would not be a restriction on the jurisdiction of the federal courts, but rather a limitation on the objectors' cause of action. It would simply mean that the objector has no cognizable claim for judicial relief until he or she has exhausted that procedure. Once such exhaustion has occurred, however, any objector dissatisfied with the outcome of that procedure could assert a claim in federal court.

IV. PRUDENTIAL CONSIDERATIONS STRONGLY FAVOR AN EXHAUSTION REQUIREMENT.

In our opening brief, we argued that the exhaustion issue presented in this case must be decided on the basis of sound judicial discretion, and we presented several reasons why exhaustion should be required. We now address respondents' criticisms of these arguments.

A. Relieving The Courts Of Having To Micromanage Agency Fees.

In response to ALPA's argument that an exhaustion requirement will relieve the courts of having to micromanage agency-fee calculations, respondents argue that fee disputes will ultimately end up in court in any event. Even if the scope of judicial review of the impartial decisionmaker's decision is limited in the way ALPA contended below it should be, they say, there will still be difficult issues for the courts to decide. (Resp. Br. 28). And, they point out, this Court did not grant certiorari

with respect to the scope of review question, so one can make no assumption as to how that issue will ultimately be resolved.[6]

To be sure, the extent to which the courts will be burdened by the minutiae of fee disputes will be affected by the scope of review. But even assuming a *de novo* standard of review, a court's task will be greatly simplified if there has been a prior arbitration proceeding. As noted above, the arbitration will at least serve to narrow and define the issues in dispute, so that by the time the case reaches the court the parties will know what they agree upon and what they do not. Furthermore, the existence of the arbitration record will reduce the need for discovery after a case comes to court, because much, if not all, of the relevant evidence will have already been produced in arbitration. At the very least, the knowledge the parties have gained through arbitration will enable them to focus their discovery requests much more precisely than would otherwise be the case. The arbitration record, plus any additional discovery materials, might also make it possible to decide the case on summary judgment, avoiding the need for any trial. Alternatively, the use of the arbitration record as evidence at trial would serve to reduce the amount of trial time required.

Nor should it be assumed that the outcome of the arbitration will always be challenged. The National Educa-

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[6] Respondents incorrectly suggest that because of this Court's limited certiorari grant, the court of appeals' reversal of the district court's ruling with respect to the scope-of-review issue is now final. (Resp. Br. 8). That is not correct. The court of appeals' ruling on this issue was tied to its ruling on the exhaustion issue. It held that because exhaustion was not required, "the parties' dispute as to the scope of review of the arbitrator's decision is beside the point," because "the arbitrator's decision is no longer part of the legal picture." (Pet. App. 4a, 13a). Therefore, if this Court reverses the court of appeals on the issue of exhaustion, a remand would be needed for further consideration of the scope-of-review issue.

tion Association, in its *amicus* brief (p. 14), states that in its experience objectors are often satisfied with the outcome of the arbitration. Even in this case, a large number of pilots accepted the outcome of the arbitration and did not join in respondents' lawsuit.

B. Elimination Of Duplicative Litigation.

We argued in our opening brief that unless exhaustion of the arbitration procedure is required before a lawsuit can be brought, unions will be forced to defend their agency-fee calculations simultaneously in both judicial and arbitral proceedings. Respondents assert that this problem can be avoided without an exhaustion requirement if the union provides for "expeditious arbitration" and a "prompt decision" by the arbitrator. (Resp. Br. 29). Respondents are not suggesting that objectors would await the outcome of such an "expeditious arbitration" before filing suit. They are merely saying that the arbitration would "likely be concluded before the merits are at issue in a court action." (*Id.*) In other words, the judicial *trial* might not occur before the arbitration is completed, but all the pretrial court proceedings—pleadings, motions, discovery—would nevertheless overlap with the arbitration. This is, of course, precisely the kind of dual-track litigation that an exhaustion requirement would prevent.

Next, respondents suggest that it is "highly unlikely" that any objectors would choose arbitration if the union "agreed to class treatment of judicial claims and willingly provided discovery." (Resp. Br. 29). Courts, however, have generally found class certification inappropriate in agency-fee cases, particularly where the named plaintiffs are represented, as respondents are here, by the National Right to Work Foundation. *See Gilpin v. American Fed'n of State, County, and Municipal Employees*, 875 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 493 U.S. 917 (1989); *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283, 304-06 (4th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1530-31 (6th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993). As these cases noted, the individuals filing a lawsuit may be "hostile to unions on political or ideological grounds," and their aim may be "to weaken and if possible destroy the union," while other members of the putative class may be "happy to be represented by the union" and wish "merely to shift as much of the cost of representation as possible to other workers, i.e., union members." *Gilpin*, 875 F.2d at 1313. In the present case, respondents did not even appeal the district court's denial of class certification.

Nor is there reason to believe that all objectors would choose litigation over arbitration merely because of the availability of discovery. In this case, ALPA provided extensive discovery to respondents,[6] but many pilots nevertheless chose not to join the lawsuit and opted instead for arbitration.

Finally, respondents suggest that a union may dispense entirely with arbitration if it provides for "expedited judicial proceedings" to resolve agency-fee disputes. (Resp. Br. 17). They base this argument on the Court's statement in *Hudson* that *"if a State* chooses to provide extraordinarily swift judicial review for these [agency-fee] challenges, that review would satisfy the requirement of a reasonably prompt decision by an impartial decisionmaker." 475 U.S. at 307 n.20 (emphasis added). Of course, ALPA is not "a State" but a private litigant, and as such has no way of controlling the swiftness of judicial litigation. In this case, for example, the proceedings in the district court took 4½ years, and would have taken even longer if the case had been tried rather than decided by summary judgment. Contrary to respondents' innu-

[6] Respondents' charge at page 29 of their brief that ALPA "oppos[ed]" all discovery in this case is false. ALPA complied with the vast majority of discovery requests made upon it. *See* footnote 2, page 3, *supra*.

endo, there were no "dilatory litigation tactics" (Resp. Br. 30) on ALPA's part. If anything, it was respondents who prolonged the litigation.[7] In fairness, however, most of the delays in the case were beyond the control of any of the parties. The many criminal cases and other matters competing for the district court's attention simply prevented it from dealing promptly with issues in this case as they arose. Such delays are unavoidable in the courts. There is no way, other than arbitration, that a union can provide the kind of prompt decision by an impartial decisionmaker that *Hudson* requires.

C. The Possibility That In Some Cases Arbitration Will Produce A Result Satisfactory To The Objectors.

We argued below that if exhaustion is required, the arbitration would in some cases produce a result satisfactory to the objectors, thus obviating the need for any court litigation. Respondents disagree. First, they argue that because the substantive standards for determining chargeability are quite broad and vague, nonmembers are likely to continue to seek judicial resolution of chargeability issues. (Resp. Br. 30). This argument is a *non-sequitur*. A party can be satisfied with the result of a specific case even if the governing legal principles are unclear. Indeed, a rational litigant may decide to accept rather than to appeal a particular decision precisely because the law is uncertain. Such uncertainty, after all, increases the risk that the outcome of further litigation will be even less satisfactory than the result already obtained.

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[7] Respondents delayed the case by moving to amend their complaint on October 8, 1992 (R. 37), more than two months after the parties had filed cross-motions for summary judgment; by moving to reopen discovery on February 19, 1993 (R. 55), 7-1/2 months after discovery had closed; and by bringing a large number of intervenors into the case by a motion filed on January 10, 1994 (R. 72).

Next, respondents argue that various procedural issues relating to the arbitration can generate court litigation. (*Id.* at 31). Again, the fact that such issues could be raised does not mean that objectors will always wish to raise them. If they find the arbitrator's decision on the merits satisfactory, they will have no reason to challenge it on procedural grounds.

Finally, respondents assert that objectors are unlikely to accept an arbitration decision when they have not participated in the selection of the arbitrator. (*Id.*) They make this assertion as if it were self-evident, but there is no reason why it should be so. We have already shown that the AAA selection procedure is fair. (*See* pp. 2-3, *supra*). The parties also do not have any voice in the selection of the judge assigned to their case in a court proceeding, yet no one would suggest that this fact, in itself, makes the judge's decision suspect. And, contrary to respondents' suggestion that courts are better equipped than arbitrators to resolve agency-fee disputes, the experience of most arbitrators will probably be more relevant to such disputes than that of federal judges. Because of their labor-relations background, arbitrators will likely be better equipped than judges to determine the core issue in such disputes—namely, which activities and expenditures are reasonably related to the union's performance of its collective bargaining responsibilities.

Admittedly, no one can predict with certainty how often the decisions of arbitrators will be acceptable to all parties. It is reasonable to assume, however, that if exhaustion is required in every case, *some* of the arbitration decisions will be.

D. The Likelihood That Any Arbitration Proceeding And Decision Will At Least Simplify And Define The Issues For Judicial Determination.

In response to ALPA's argument that an arbitration will at least simplify and define the issues to be litigated in any subsequent court action, respondents rely on their

various criticisms of the fairness and adequacy of the arbitration procedure, which we have already addressed above. (*See* pp. 1-4, *supra*). We would only add here that if, in any particular case, the arbitration proceeding does not afford objectors a fair hearing, or if the court finds that the nature and quality of the evidence presented at the hearing was not adequate to meet the union's burden of proof, then the court would have full authority to grant whatever relief is appropriate. No one is arguing in this case that the decision of an arbitrator in a *Hudson*-type proceeding would be final and binding on the parties. While the issue of what the precise standard of review will be is still to be resolved, there is no dispute that the court would have authority to review the arbitration for procedural fairness and proper application of the burden of proof. However, if there has been a fair arbitration proceeding—as we believe there was here—the record of that proceeding, and the decision of the arbitrator, will surely simplify the court's task in deciding the matter on the merits.

V. OBJECTORS SUFFER NO COGNIZABLE INJURY DURING THE PENDENCY OF THE ARBITRATION PROCESS.

Respondents argue that arbitration injures objectors because, during the pendency of that process, they are "deprived for a substantial time" of a portion of their wages that the union may ultimately be found not to be entitled to collect. (Resp. Br. 41). Collection of agency fees, however, does not violate any objector's rights, so long as there are procedures in place "which will avoid the risk that [objectors'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Hudson*, 475 U.S. at 305 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 244 (1977) (concurring opinion)). The only legitimate grievance objectors may have "stems from the *spending* of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds." *International*

Ass'n of Machinists v. Street, 367 U.S. 740, 771 (1961) (emphasis added). The objector's "interest [is] in not being *compelled to subsidize* the propagation of political or ideological views that they oppose . . . ." *Hudson*, 475 U.S. at 305 (emphasis added). The requirement of an escrow pending arbitration of the "amounts reasonably in dispute," 475 U.S. at 311, was intended to guard against any such expenditure while the arbitration was in process. So long as such an escrow is in place, objectors can suffer no legally cognizable injury during the pendency of the arbitration.

Respondents' argument that the amount of the escrow may ultimately turn out to be inadequate (Resp. Br. 40) is a quarrel with the holding of *Hudson* itself. The Court specifically determined in that case that a 100 percent escrow would not be required, because it would "depriv[e] the Union of access to some escrowed funds that it is unquestionably entitled to retain." 475 U.S. at 310. If in a particular case objectors believe that an escrowed amount is inadequate to cover their claims, they could complain to the arbitrator or a court. No such complaint was ever voiced in this case.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment below should be reversed and the case remanded for further proceedings in accordance with this Court's ruling.

Respectfully submitted,

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